

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY No.: 04-60106 DDO

Daniel S. Miller,

Debtor.

Daniel S. Miller,

Adv. No.: 04-6043

Plaintiff,

vs.

Daniel Altepeter, et al.,

Defendants.

**TRI-MACK POTATO, INC.'S
REPLY TO DEBTOR'S OPPOSITION
TO SUMMARY JUDGMENT MOTION**

Tri-Mack's motion for summary judgment is driven by the undisputed fact that no sale of the Wheat to the Debtor ever occurred. The Affidavit of Donald F. (Sonny) Mack, Jr. states clearly that no such sale occurred and that title to the Wheat was never transferred from Tri-Mack to the Debtor.

The Debtor's opposition consists of an unverified Objection, an unverified Memorandum and an Affidavit of Daniel S. Miller. Because the Objection and the Memorandum are not verified, those documents are simply arguments of counsel and are not evidence. The Debtor's strategy of attempting to shoe-horn into evidence unsupported statements of fact in its unverified Objection and unverified Memorandum must fail. The Court should properly disregard all such unsupported and unverified statements of fact. As discussed below, the Affidavit of Daniel Miller (the Debtor in this case) fails to refute the essential and controlling facts in this case, and fails completely to substantiate support, or verify, in any respect, the argumentative statements of his counsel.

The Debtor, in his Affidavit, does not refute or dispute the fact that no such sale occurred. The Affidavit of Daniel Miller admits that Tri-Mack delivered the Wheat to Bins 9, 10, and 11

owned by Dale Jeffrey. Daniel Miller further admits that he consented and acquiesced in Tri-Mack's mortgaging of the Wheat to the CCC loan. Daniel Miller, as an experienced grain dealer, knows full well that the Wheat could only be mortgaged by the owner thereof. Obviously, the Debtor understood and believed that Tri-Mack was the owner of the Wheat.

More importantly, Mr. Miller completely fails to address the opposite position he has previously taken in this case, as reflected in Exhibit B to the Affidavit of Sonny Mack, which is the Debtor's own motion to abandon the Wheat in question. Paragraph 4 of that motion states as follows:

"4. This motion is based upon the fact that the Debtor did not own the Tri-Mack grain, and the Debtor is not entitled to retain the proceeds thereof. Further, the Tri-Mack grain is subject to a security interest in favor of the CCC in the approximate amount of \$44,750.00."

The Debtor signed a sworn verification to this motion which stated as follows:

"Debtor, Daniel S. Miller, *declares under penalty of perjury* that the foregoing is true and correct to according to the best of his knowledge, information and belief."

(italics supplied).

The Debtor, in his affidavit, does not even attempt to reconcile his previous sworn statements filed in this case. The Debtor should not be allowed to come into this Court and contradict his own previous position and sworn statement. (The attempt by the Debtor's counsel to argue, in an unverified Objection, that unspecified information has "come to light" after the Wheat was mortgaged and after the Debtor filed its motion to abandon, is not persuasive. It is instructive that the Debtor's affidavit does not state any facts which support his counsel's argument that "new" information not previously possessed by the Debtor has now "come to light." The Debtor had, at all times, all the information and at all times held Tri-Mack out as the owner of the Wheat.)

The Debtor appears to attempt to argue, without any foundation for his statements, that some other third parties may have an interest in the Wheat. Even if that were so, that does not translate

into an interest of the Debtor in the Wheat. The Debtor cannot attempt to interpose the speculative interest of third parties in the Wheat as a defense to Tri-Mack's motion. The issue before this Court is whether the Debtor itself has an interest in the Wheat. The Debtor does not have, and has not demonstrated, any ownership interest in the Wheat.

In conclusion, the Debtor simply has not refuted the controlling facts set forth in the sworn Affidavit of Sonny Mack. The Debtor has, by acquiescing in Tri-Mack's mortgaging of the Wheat, and in his own motion filed in this case, acknowledged that Tri-Mack owns the Wheat. Furthermore, the documentary evidence on which the Debtor relies (Exhibits B, C and D) are hearsay and the Debtor has not provided any foundation to authenticate such exhibits, and has not demonstrated any personal knowledge with respect to the substance thereof. The Debtor has made no showing that he is competent to testify about the substance of such Exhibits. The Debtor has not demonstrated the author thereof, or how the information was compiled, or the activities or source of the information in such Exhibits. Tri-Mack accordingly objects to the utilization by the Debtor of all of the exhibits attached to the Affidavit of the Debtor, and Tri-Mack respectfully requests that the Court not consider such Exhibits in this matter.

**LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.**

Dated: September 28, 2004

/e/ Brian F. Leonard
By _____
Brian F. Leonard, #62236
Matthew R. Burton, #210018
Attorneys for Tri-Mack Potato, Inc.
100 South Fifth Street, Suite 2500
Minneapolis, Minnesota 55402-1216
(612) 332-1030

VERIFICATION

I, Brian F. Leonard, the attorney for Tri-Mack Potato, Inc., state under penalty of perjury that the foregoing information is true and correct to the best of my information and knowledge.

/s/ Brian F. Leonard

Dated: September 28, 2004

Brian F. Leonard

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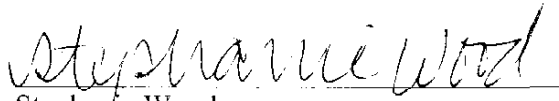
UNSWORN CERTIFICATE OF SERVICE

I, Stephanie Wood, declare under penalty of perjury that on the 28th day of September, 2004, I faxed a copy of the annexed *Tri-Mack Potato, Inc.'s Reply to Debtor's Opposition to Summary Judgment Motion*

Ryan R. Dreyer, Esq.
Gislason & Hunter LLP
2700 South Broadway
P.O. Box 458
New Ulm, MN 56073
Fax No.: 507-354-8447

by faxing to all parties copies thereof, directed to said party at the last known facsimile number of said parties.

Dated: September 28, 2004


Stephanie Wood
100 South Fifth Street, Suite 2500
Minneapolis, MN 55402
(612) 332-1030